Supreme Court, U.S.
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No. 98-1077

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

Californians for Safe and Competitive Dump Truck Transportation, Lindeman Brothers, Inc., and Yuba Trucking, Inc.,
Petitioners,

v.

Roberta E. Mendonca, Lloyd W. Aubry, Jr., James W. Van Loben Sels, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

May California impose on motor carriers an anticompetitive public policy, different from that existing elsewhere in the nation, when the policy increases prices by 25%, disrupts service markedly, and directly interferes with the routing of trucks and employees in contravention of deregulation mandated by 49 U.S.C. Section 14501(c)(1)?

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ARGUMENTS IN REPLY

Responding to the arguments advanced by the Respondents in this matter, Petitioners respectfully submit:

1. The Decision Below Merits Review Under Criteria Utilized By This Court.

First, the Decision below decides an important federal question in a way which conflicts with the relevant opinions of this Court. The Decision simply cannot be reconciled with Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) and American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995) as more fully explained in the Petition herein and by the *amici curiae*. It is directly contrary to decisions interpreting the Airline Deregulation Act ("ADA") expressly adopted by Congress in enacting the FAAA Act. *See*, Petitioners' discussion of Federal Express v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991) *cert. denied*, 504 U.S. 979 (1992).

Second, the Decision below decides an important question of federal law, which has not been, but should be, settled by this Court. More specifically, the question of whether the FAAA Act preempts a State prevailing wage statute ("CPWL") which indisputably impacts the rates, routes and services of motor carriers[1], has not previously been

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[1] CPWL mandates an artificially inflated wage specifically for truckers. Contrary to the assertion of Respondents that CPWL outlaws a "substandard" wage, in fact, it forces carriers to pay wages which are 75% higher than dictated by the marketplace or alternatively, to utilize independent owner-operators. California's mandated policy offends the admonition of this Court in Wolens, to wit, "the ban on enacting or enforcing any law 'relating to rates, routes, or services' is

decided by this or any court.

Third, the Decision below departs from the accepted and usual course of judicial proceedings in such a manner as to call for an exercise of this Court's supervisory power. More specifically, the Decision below stands for the proposition that judges are not required to apply the economic litmus test for FAAA Act preemption announced by Congress; rather they may disregard the facts and approve State regulatory schemes which suit their personal fancy, even while acknowledging that the State scheme impacts motor carrier prices, routes and services. The net result is to substitute the judgment of the judiciary for that of Congress.

2. The Decision Below, A Case Of First Impression, Articulates An Inappropriate Standard For FAAA Act Preemption.

As the first reported case of real significance with respect to FAAA Act preemption, the Decision below limits Congress's "overarching deregulatory purpose" by concluding that the admitted effect of CPWL is "indirect, remote and tenuous" and therefore not preempted. Notably, the court reaches this conclusion without any evaluation of the undisputed facts. In so doing, the opinion establishes an obtuse, amorphous and unworkable standard with respect to the review of State action affecting prices, routes and services of motor carriers.

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most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.'" Wolens, *supra*, 513 U.S. at 229, n. 5.

In defending the court's approach, Respondents claim that Petitioners "exaggerate" the effect of prevailing wage law on motor carriers.[2] However, like the court, Respondents neglect to advise that the judgment below rested on a motion to dismiss. As such, all material allegations in the Complaint (including those which Respondents incorrectly claim are exaggerated) must be taken as true and construed in the light most favorable to Petitioners. *See,* NL Industries v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

Given the unique procedural context of this case and the undisputed dramatic impact of CPWL on the motor carrier operations of Petitioners, the legal principle adopted by the court below, disconnected as it is from any factual evaluation, guts Congress's simple deregulatory objective set forth in the plain language of the statute and its no nonsense legislative history.

3. The Challenged State Action Is "Regulation" Subject To FAAA Act Preemption.

Respondents assert that CPWL is not preempted because as to public works projects, California is the "ultimate consumer" willing to pay the price of an artificially inflated wage, and further, that as part of its procurement policies, California must be free to contract with whom it

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[2] Respondents also argue that by preempting CPWL the Court will eradicate State employment regulation and "*every*" State law with an indirect effect on motor carrier prices. This is simply not so. *See*, fn. 16 of the Petition herein.

pleases subject to any restrictions it wishes to impose.[3]

First, these arguments rightly have been rejected by the courts. CPWL is not exempt from preemption on the theory that the State is acting as a market participant or in its proprietary function. Under CPWL:

> California . . . is not acting merely as a "market participant" rather than a regulator. The state's involvement does not end with the awarding of the contract. [Calif. Lab. Code] Section 1777.5 is aimed at regulating contractors who work on public contracts. The Division, part of a state agency, monitors and enforces violations of section 1777.5. This amounts to regulation, not merely "market participation".

Hydrostorage, Inc. v. Northern California Boilermakers, Local Joint Apprenticeship Commission, 891 F.2d 719, 730 (9th Cir. 1989) *cert. denied*, 498 U.S. 822 (1990). *See also,* Associated General Contractors of America v. Metropolitan Water District, 159 F.3d 1178, 1184 (9th Cir. 1998); Dillingham Construction v. County of Sonoma, 57 F.3d 712,

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[3] Respondents fail to tell the Court that California does not contract directly with the Petitioning motor carriers, but rather imposes CPWL on their operations by and through State law. *See also*, fn. 4, *infra*.

9th Cir. 1995) *rev'd on other grounds*, 519 U.S. 316 (1997).[4]

Second, by urging this Court to focus on the State as a willing "ultimate consumer," Respondents distort the proper focus of FAAA Act preemption, which requires an analysis of the effect of State regulation on motor carriers. In enacting the FAAA Act, Congress sought to unleash the creative energies of carriers by permitting service options to be dictated by the marketplace, not State mandated "policies." CPWL compromises these goals to the greatest imaginable extent. The majority of the business of Petitioning motor carriers (dump truck carriers) is on public works projects (*e.g.*, building highways). By altering the fundamental economics of the biggest portion of their business, CPWL radically impacts all remaining carrier activities. Thus a motor carrier simply cannot base its pricing on CPWL for fear of losing the business to a carrier who uses independent owner-operators (not subject to CPWL); nor can a motor carrier afford not to compete for the business of shippers engaged on public works projects. The resultant impact on all other shippers and the distortion of the competitive landscape in general are enormous. This Congress could not have

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[4] The California Supreme Court reached a similar conclusion in Lusardi Construction Company v. Aubry, 1 Cal.4th 976, 986-988 (1992), by recognizing that the obligation of a contractor on a public works project to pay the prevailing wage flows from the statutory duty imposed by CPWL and not exclusively from an independent contractual requirement. Furthermore, CPWL applies whether the work is performed by a contractor or subcontractor and whether or not the contractor or subcontractor has knowledge of the CPWL aspect of the contract. *See, Ibid*; Calif. Lab. Code Section 1772.

intended to permit.[5]

4. This Court's Opinion In Travelers Is Not Dispositive.

Respondents advance the argument that this Court has already rejected Petitioners' case in N.Y. Conference of Blue Cross v. Travelers Insurance Company, 514 U.S. 645 (1995), interpreting ERISA preemption, because there the Court permitted a 24% increase in hospital costs. They aver that this is similar in magnitude to the 25% increase in motor carrier "costs" [sic] in this case. Respondents' argument is wrong.

First, Travelers dealt with a 24% increase in minor hospital costs. By contrast, CPWL increases motor carrier wage *costs* by 75% resulting in an overall increase in *price* of 25%. Unlike the costs surcharged in Travelers, the wages increased by CPWL comprise a huge portion of overall carrier costs (as much as 40%). Factually, there is simply no comparison between the two cases, which an evaluation by the court of the facts would have made crystal clear.

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[5] In their opposition at footnote 5, Respondents express confusion over the relevance of CPWL's peculiar application to transportation over California's highways. Federal prevailing wage law applies *only* to activities "on the site" of the public work. By the FAAA Act, Congress sought to eliminate the patchwork of State regulation in existence at the time of the enactment of the FAAA Act. "The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business." App. F to Petition at 50a. In establishing different requirements for motor carriers operating in California than existing elsewhere in the nation, CPWL perpetuates the patchwork of State regulation Congress sought to eliminate.

Second, in enacting ERISA preemption, Congress was not concerned with indirect economic influences. "[C]ost-uniformity was almost certainly not an object of [ERISA] pre-emption . . ."; nor was indirect economic regulation which "simply bears on the costs of benefits." Travelers, *supra*, 514 U.S. at 659-660. By contrast in enacting the FAAA Act, Congress explicitly sought to eliminate State economic regulation of motor carriers which "increased costs." App. F to Petition at 50a.[6] Thus, on balanced review, this Court cannot be said to have determined in Travelers, or otherwise, that CPWL does not offend the FAAA Act in the manner and to the prohibited extent asserted by Petitioners.

5. FAAA Act Preemption Is Not Limited To State Public Utility Regulation.

Finally, Respondents urge that Congress only intended to preempt typical forms of public utilities regulation. This argument has been rejected by this Court in Morales:

> This simply reads the words "relating to" out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the states to "*regulate* rates, routes, and services".

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[6] *See also*, Federal Express, *supra*, 936 F. 2d at 1078: "Regulations which are not patently economic . . . relate to the terms on which the . . . carrier offers its services. Terms of service determine cost. To regulate them is to effect the price. The terms of service are as much protected from state intrusion as are . . . rates."

Morales, *supra*, 504 U.S. at 384. There, this Court specifically held that laws of general applicability were also preempted by the FAAA Act. *Id.* at 385-6.

In addition, the position advanced by Respondents is inconsistent with the pronouncements of Congress that it did "not intend for States to attempt to *de facto* regulate, prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority." App. F to Petition at 48a.

CONCLUSION

A Writ of Certiorari should issue.

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